86-1948 (3)

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HENRY ANDERSON, Appellant,

v.

OREGON STATE BAR, DONALD W. McEWEN, JANICE M. STEWART, JOSEPH J. HANNA, JR., DEAN P. GISVOLD, ROBERT D. RANKIN, PEGGY S. FORAKER, GENE C. ROSE, ANTHONY YTURRI, CARL BURNHAM, J.R., Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OREGON STATE BAR'S MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
Decisions Below	2
Appellee's Statement of the Case	3
Argument in Support of Motion to Dismiss	5
This Case Is Not Within This Court's Appellate Jurisdiction; Review, if Available at All, Is Only Available by Writ of Certiorari	5
Argument in Support of Motion to Affirm	7
1. No Further Argument is Required; the Court of Appeals' Decision Should be Affirmed	7
2. The Court of Appeals Correctly Held that the District Court Did Not Abuse Its Discretion in Dismissing the Case for Want of Prosecution	8
3. The Court of Appeals Correctly Held that Use of a Magistrate To Hear Pretrial Matters and To Make Findings and Recommendations is Authorized by Law	11
Conclusion	12
Appendix A Findings and Recommendations	App-1
Appendix B Order	App-3

Appendix C
Judgment App-4

Appendix D
Order App-5

Appendix E
Order App-6

TABLE OF AUTHORITIES

Page

Cases Cited

Blue Mountain Constr. Co. v. Werner, 270 F.2d 305 (9th Cir. 1959), cert. denied 361 U.S. 931 (1960) 10

Hooper v. Chrysler Motors Corp., 325 F.2d 321 (5th Cir. 1963), cert. denied 377 U.S. 967 (1964) 10

Kabbe v. Rotan Mosle, Inc., 752 F.2d 1083 (5th Cir. 1985) ... 10

Link v. Wabash Railroad Company, 370 U.S. 626 (1962) 9

Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978) 10

Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394 (2d Cir. 1970) 10

United States v. Raddatz, 447 U.S. 667 (1980), reh. denied 448 U.S. 916 (1980) 12

Statutes Cited

28 U.S.C. § 636(b) 11

28 U.S.C. § 636(b)(1)(B) 3,5,11

28 U.S.C. § 1252 6

28 U.S.C. § 1254(1) 6

28 U.S.C. § 1254(2) 6

No. _____

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October Term, 1986

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OREGON STATE BAR, DONALD W. McEWEN, JANICE M. STEWART, JOSEPH J. HANNA, JR., DEAN P. GISVOLD, ROBERT D. RANKIN, PEGGY S. FORAKER, GENE C. ROSE, ANTHONY YTURRI, CARL BURNHAM, J.R., Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OREGON STATE BAR'S MOTION TO DISMISS OR AFFIRM

Appellee Oregon State Bar, pursuant to Rule 16.1, Rules of the Supreme Court of the United States, moves the Court for an order dismissing the appeal in this case on the ground that the case is not within the court's appellate jurisdiction or, in the alternative, affirming the decision of the United States Court of Appeals for the Ninth Circuit on the ground that it is manifest that the questions on which the decision of the cause depends are so

unsubstantial as not to need further argument.

DECISIONS BELOW

On January 3, 1986 United States Magistrate George E. Juba of the United States District Court for the District of Oregon entered his Findings and Recommendation that this action should be dismissed (Appendix A). On January 24, 1986 United States District Judge Edward Leavy, after de novo review, entered an order dismissing the action (Appendix B) and a judgment of dismissal (Appendix C).

On June 19, 1986 the United States Court of Appeals for the Ninth Circuit issued an order granting appellee's motion for summary affirmance (Appendix D). On October 6, 1986 that court issued its order denying appellant's petition for rehearing en banc (Appendix E). None of the above decisions has been published.

APPELLEE'S STATEMENT OF THE CASE

Appellant filed an action in the United States District Court for the District of Oregon, seeking damages from the Oregon State Bar and some of its members for alleged injuries arising out of prior litigation. The complaint was filed on July 1, 1985. On that date the district court issued its order setting a completion date for discovery and ordering that a pretrial order be lodged by November 28, 1985. On September 6, 1985 District Judge Panner ordered that the case would be assigned to Magistrate Juba for all pretrial matters. The order stated that because appellant had not consented to the use of a magistrate, "§ 636(b)(1)(b) decisions by the Magistrate will be by Findings and Recommendations rather than by order." On October 10, 1985 appellant filed a notice of objections to use of a magistrate.

On December 10, 1985 Magistrate Juba issued an Order to Show Cause why the action should not be dismissed for want of prosecution because no pretrial order had been lodged. On December 27, 1985 appellant filed his "response" to that order, in which he refused to show cause because the term "pretrial order" was ambiguous and because he objected to the use of a magistrate. On January 3, 1986 Magistrate Juba filed his Findings and Recommendation that the action should be dismissed for want of prosecution. On January 24, 1986 District Judge Leavy, after de novo review, ordered that the action be dismissed. Judgment of dismissal was entered that same date.

Appellant appealed to the United States Court of Appeals for the Ninth Circuit. Appellee Oregon State Bar then filed with that court a motion for summary affirmance which was granted by order of June 19, 1986 (after the parties had filed

briefs with the court). The summary affirmance was granted on the ground that the district court did not abuse its discretion in dismissing the case for lack of prosecution in light of appellant's refusal to make any meaningful response to the order to show cause. Appellant then petitioned for rehearing en banc. The United States Court of Appeals for the Ninth Circuit, by order of October 6, 1986 denied that petition on the stated ground that because the case had been referred to a magistrate under 28 U.S.C. § 636(b)(1)(b), appellant's consent to the use of a magistrate was not required.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

This Case Is Not Within This Court's Appellate Jurisdiction; Review, if Available at All, Is Only Available by Writ of Certiorari.

This Court has jurisdiction to entertain direct appeals from decisions of the United States Courts of Appeals in

cases in which the United States is a party and the Court has declared an Act of Congress unconstitutional, 28 U.S.C. § 1252, or in any case in which the Court of Appeals has held a state statute to be invalid. 28 U.S.C. § 1254(2). In this case the United States is not a party and the Court of Appeals has not invalidated either an Act of Congress or a state statute. It simply held that the District Court did not abuse its discretion by dismissing the action when appellant refused to file a pretrial order and that limited use of a magistrate in this case was proper.

If review by this Court is available at all it is by writ of certiorari rather than by direct appeal. 28 U.S.C. § 1254(1). However, for the reasons discussed below in support of appellee's alternative motion to affirm, certiorari should not be granted in this case.

ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

1. No Further Argument Is Required; the Court of Appeals' Decision Should Be Affirmed.

It is not clear from appellant's jurisdictional statement just what questions he wishes to pursue on appeal to this Court. On the record summarized above, however, it is clear that only two issues could possibly be presented. The first is whether the Court of Appeals erred in holding that the District Court did not abuse its discretion when it dismissed the case for want of prosecution. The second is whether the Court of Appeals erred in holding that appellant's consent to the use of a magistrate was required under the circumstances of this case. As shown below, both rulings were clearly correct.

2. The Court of Appeals Correctly Held that the District Court Did Not Abuse Its Discretion in Dismissing the Case for Want of Prosecution.

Appellant was notified at the time he filed his complaint that a pretrial order would have to be lodged by November 28, 1985. On December 10, 1985 he was ordered to show cause why that had not been done and was notified, by the terms of that order, that if he did not show cause the action would be dismissed. He refused to show cause.

Dismissal of the action under those circumstances is within the District Court's authority, and its action will be upheld unless it has abused its discretion:

> ". . . when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range

> of the court's discretion." Link v. Wabash Railroad Company, 370 U.S. 626, 633 (1962).

In Link this Court held that it was not an abuse of discretion to dismiss a case when the plaintiff's attorney, without adequate excuse, did not appear for a scheduled pretrial conference and there was a previous history of delay. The District Court judge, in that case, acted without advance notice and without affording the plaintiff any opportunity to respond to the proposed dismissal of the action. In this case, by contrast, the appellant was notified that the action could be dismissed because of his failure to file a pretrial order and was given the opportunity, which he refused, to show good cause for his failure to do so. He did not ask for additional time, but simply made it clear that he did not intend to comply with the court's order because he believed it had been made without authority. As shown below, however, the order to show cause was

authorized and appellant was not entitled to ignore it.

Dismissal for impeding the progress of a case by deliberate refusal to obey an order of the court has frequently been held not to be an abuse of discretion. See, e.g., Kabbe v. Rotan Mosle, Inc., 752 F.2d 1083 (5th Cir. 1985) (failure to comply with court order to appear for deposition); Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978) (refusal to comply with discovery orders); Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394 (2d Cir. 1970) (refusal to proceed to trial after application for continuance denied); Hooper v. Chrysler Motors Corp., 325 F.2d 321 (5th Cir. 1963), cert. denied 377 U.S. 967 (1964) (same); Blue Mountain Constr. Co. v. Werner, 270 F.2d 305 (9th Cir. 1959), cert. denied 361 U.S. 931 (1960) (plaintiff refused to proceed further after adverse ruling on motion and failed to appear at pretrial conference). In his brief to the

United States Court of Appeals for the Ninth Circuit, appellant made no attempt to show that dismissal was an abuse of discretion in this case.

3. The Court of Appeals Correctly Held that Use of a Magistrate To Hear Pretrial Matters and To Make Findings and Recommendations Is Authorized by Law.

District Judges are authorized by 28 U.S.C. § 636(b) to refer pretrial matters to a magistrate. With respect to certain dispositive pretrial matters, § 636(b)(1)(B) provides that the magistrate shall submit proposed findings and recommendations to the district judge. Section (b)(1) further provides for an opportunity for any party to file objections to those findings and recommendations and for de novo review by the district judge of any portion to which objection is made.

In this case appellant filed no objections. District Judge Leavy nevertheless conducted a de novo review before adopting the magistrate's findings and recommendation. The procedure which is authorized by statute and which was followed in this case does not violate appellant's rights. United States v. Raddatz, 447 U.S. 667 (1980), reh. denied, 448 U.S. 916 (1980).

CONCLUSION

The Court of Appeals was clearly correct when it affirmed the District Court's dismissal of this case for want of prosecution. Appellant refused to file a pretrial order within the time allowed by the District Court and refused to show reasonable cause why he had not done so. Because he did not consent to the use of a magistrate, the District Court ordered that the magistrate would make only findings and recommendations, not orders, on dispositive matters. The District Court reviewed de novo the recommendation of the magistrate

that the action be dismissed. There was no abuse of discretion and no violation of appellant's constitutional rights.

This appeal should be dismissed on the ground that it is not within this Court's appellate jurisdiction. Moreover, no questions of substance justifying plenary review by this Court are presented on the record. For the reasons stated above, the court should dismiss the appeal and refuse to issue a writ of certiorari or, in the alternative, should affirm without further argument.

Respectfully submitted,

SCHWABE, WILLIAMSON,
WYATT, MOORE & ROBERTS
RIDGWAY K. FOLEY

By: _____
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Of Attorneys for
Appellee

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HENRY ANDERSON,	)	
	)	
Plaintiff,	)	Civil No. 85-1145-JU
	)	
v.	)	
	)	FINDINGS AND
OREGON STATE BAR, et al,	)	RECOMMENDA-TIONS
	)	
Defendant.	)	

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JUBA, Magistrate:

By order dated December 10, 1985, plaintiff was ordered to show cause why the action should not be dismissed for want of prosecution.

This order was based on plaintiffs failure to lodge a pretrial order on or before November 28, 1985 as ordered.

Plaintiff filed a "Response to Show Cause Order" wherein he declines to respond.

The action should be dismissed.

Dated this 2 day of January, 1986.

/s/ George E. Juba
United States Magistrate

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HENRY ANDERSON,	)	
	)	
Plaintiff,	)	Civil No. 85-1145-JU
	)	
v.	)	—
	)	ORDER
OREGON STATE BAR, et al,	)	
	)	
	)	
Defendant.	)	

After a de novo review, IT IS ORDERED that the action is dismissed.

Dated this 24th day of January, 1986.

/s/ Edward Leavy
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HENRY ANDERSON,	)	
	)	
Plaintiff,	)	Civil No.
	)	85-1145-JU
v.	)	
	)	JUDGMENT
OREGON STATE BAR, et al,	)	
	)	
	)	
Defendant.	)	

Based on the record,

IT IS ORDERED AND ADJUDGED that this action is dismissed.

Dated this 24 day of January, 1986.

/s/ Robert Christ
Clerk of Court

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY ANDERSON,	)	
	)	
Plaintiff-Appellant,	)	No. 86-3591
	)	
vs.	)	DC# CV-85-1145-LE
	)	
OREGON STATE BAR, et al,	)	Oregon (Portland)
	)	
Defendants-Appellees.	)	ORDER

Before: KOELSCH, FERGUSON and REINHARDT, Circuit Judges

Appellee's motion for summary affirmance is granted. The district court did not abuse its discretion in dismissing the case for lack of prosecution in light of appellant's refusal to make any meaningful response to the order to show cause. Ash v. Cvetkov, 739 F.2d 493 (9th Cir. 1984). The judgment entered January 28, 1986, is affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY ANDERSON,	)	
	)	
Plaintiff-Appellant,	)	No. 86-3591
	)	
vs.	)	DC# CV-85-1145-LE
	)	
OREGON STATE BAR, et al,	)	Oregon (Portland)
	)	
Defendants-Appellees.	)	ORDER

Before: KOELSCH, FERGUSON and REINHARDT, Circuit Judges

Appellant's petition for rehearing en banc is denied. The district court referred this matter to the magistrate under 28 U.S.C. § 636(b)(1)(B). Appellant's consent was not required.